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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of
Competition in Markets for the
Delivery of Video Programming

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CS Docket No. 99-230

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To the Commission:

JOINT REPLY COMMENTS OF
MAINSTREET COMMUNICATIONS
AND
UNITEL COMMUNICATIONS

I. INTRODUCTION

Mainstreet Communications, LLC and Unitel Communications ("Joint Commenters") hereby jointly submit the following Reply Comments in response to the Commission's *Notice of Inquiry (NOI)* in the above-captioned proceeding. The Joint Commenters' Reply Comments focus on the need for the Commission to take proactive measures to foster competition in the multi-channel video services market by eliminating the ability of incumbent cable operators to engage in anticompetitive program access and pricing practices.

During the initial stage of this *Inquiry* a number of parties filed comments highlighting the competitive concerns surrounding program access issues, in these Reply Comments the Joint Commenters seek to reinforce and expand upon the comments of these parties through a discussion of their own experiences with this issue. At the same time, the Joint Commenters

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respond to a number of misleading and inaccurate statements on the part of incumbent providers with respect to the state of video competition.

I. Background

Founded after the enactment of the 1996 Telecommunications Act, both Mainstreet Communications and Unitel Communications are the embodiment of the type of facilities-based, competitive telephone and cable providers that Congress sought to encourage through the passage of the Act. Located in Sauk Centre, Minnesota, Mainstreet Communications is building a state-of-the-art hybrid fiber-optic and coaxial cable (HFC) communications network enabling the provision of local telephone, long distance, cable television and Internet access services. Building on its foundation in Sauk Centre, Mainstreet intends to expand into additional markets in the near future.

Similarly, Unitel Communications, a joint venture of the West Central Telephone Association and Arvig Enterprises, located in Park Rapids, Minnesota, has constructed a sophisticated broadband communications network to provide competitive local exchange service, cable television service and high-speed data connectivity. Like Mainstreet, Unitel Communications plans to enter into adjacent markets as a competitor in the near term. The mission of both Mainstreet and Unitel is to introduce facilities-based competitive choice for consumers in their respective markets.

The incumbent cable system in both Sauk Centre and Park Rapids is owned by Bresnan Communications, Inc. (Bresnan). Bresnan acquired the system in 1998 from TCI, and has announced a pending sale of the system to Charter Communications, Inc. TCI's successor by merger, AT&T, retains a 50% interest in Bresnan. AT&T is the largest cable provider in the United States, currently passing 40% of all serviceable homes. Charter is the country's 4th largest cable provider.

II. The Commission Must Take Steps To Foster Competition

Section 628(g) of the Communications Act of 1934, as amended, directs the FCC to provide an annual report to Congress on the status of competition in markets for the delivery of programming. The Commission has issued the present *NOI* to assist it in gathering information and data for the development of the 1999 Report to Congress. The FCC has requested information on the status of competition and the prospects for increased competition.

The Joint Commenters urge the FCC to use the annual report as an opportunity to renew its commitment to carry out the letter and the spirit of the Telecommunications Act by taking decisive actions to eliminate anticompetitive behavior on the part of incumbent cable operators. Contrary to the assertions of AT&T/TCI and other incumbent operators the multichannel video service market is far from competitive. As a wide variety of commenters noted during the initial round of comments, incumbent cable operators continue to exercise pervasive dominance over the video marketplace and the massive industry consolidation that has taken place during the intervening year has effectively concentrated this market power at an unprecedented level into a handful of multiple system operators (MSOs), which include both the current and proposed owner of Bresnan. New competitive cable entrants ranging from Hiawatha Broadband Communications to Ameritech New Media, have cautioned the Commission that the resulting consolidation of incumbent cable operators has lead to an even greater ability on the part of these MSOs to engage in anticompetitive activities, often at the expense of consumers who desire more choice, better service and lower rates.

Moreover, a slight reduction in overall national market share does not mean that incumbents have lost the ability to exercise market control within individual local markets and regions of the country. As new entrants can attest, entering a former monopoly market is a customer-by-

customer, community-by-community undertaking. It is at this level, that the on-going mergers and clustering have actually brought about an increase in market control.

Accordingly, the Joint Commenters agree with other competitive cable providers that given the increasingly concentrated nature of the Multichannel Video Programming Distribution (MVPD) environment and the elimination of rate regulation for most cable services, it is vitally important that the FCC take every opportunity to act aggressively to foster competition in the video services market by removing unfair, monopoly-derived advantages, wherever and whenever possible.

III. The Commission Must Eliminate Anticompetitive Practices With Respect To Program Access

A. Exclusive Programming Is Inherently Anticompetitive

The Joint Commenters have devoted significant amounts of time, capital and resources into the development and construction of competitive broadband networks, with the intent of competing head-to-head with the incumbent cable and local exchange carriers. As daunting as this prospect has been, the Joint Commenters remain confident in their ability to compete for and win customers through the provision of a superior product and superior customer service, so long as the competition is on a level playing field. Unfortunately, the incumbent cable operator has leveraged its market dominance throughout the upper Midwestern United States to obtain access to programs on an exclusive basis that create a decidedly unlevel playing field.

When Mainstreet Communications applied to obtain a franchise agreement in Sauk Centre, the local franchising authority insisted that in order to maintain regulatory parity, and not provide Mainstreet with a competitive advantage over the incumbent operator, the agreement must contain identical terms and conditions as those imposed on the incumbent provider. Yet once Mainstreet entered the market it found that it was unable to obtain consent to carry at least four popular program channels, because their providers have agreements with the incumbent that grant it the

exclusive right to carry the programming by cable in all communities the incumbent serves. The channels include Midwest Sports Channel (MSC), a regional sports channel; Fox Sports World, a national sports network; MSNBC, a national news network; and Game Show Network, a popular entertainment channel. All are popular channels among potential subscribers.

MSC in particular is considered an essential channel by many potential subscribers, because it holds exclusive broadcast rights for certain games of the Minnesota Twins baseball team, the Minnesota Timberwolves basketball team, the University of Minnesota Gophers (all sports), the Big 10 and the Western Collegiate Hockey Association, and broadcasts other regional and national sports programming. Mainstreet has already begun to feel the impact of not being able to carry MSC in the Sauk Centre service area. A large number of customers have indicated that they are very interested in Mainstreet's services but have decided not to give it a "try" because they would not be able to view the Minnesota sports teams carried on MSC.

Unitel Communications has experienced a nearly identical situation. It has been unable to obtain access to MSC or the Fox News channel because of exclusive agreements with Bresnan. Like Mainstreet Communications, Unitel has met resistance to market acceptance of their bundled service offering of voice, video and data, due specifically to their inability to carry MSC. Compounding the egregiousness of this denial in the case of Unitel, is the fact that its headend facilities which are operated by contract with Tekstar Cablevision, presently receive the MSC signal. Tekstar is an authorized affiliate of MSC and delivers MSC to its customer base in surrounding communities, but has been prohibited by Bresnan from extending this program into Park Rapids over Unitel's network.

Further demonstrating the arbitrary and discriminatory power of Bresnan with respect to its exclusive program access agreement with MSC, is the fact that direct broadcast satellite providers

such as Direct TV are authorized to carry MSC within Park Rapids. This effectively isolates Unitel as the only multichannel video service provider within the community who is unable to offer regional sports programming.

As Hiawatha noted in its initial comments, the FCC has recognized that access to programming is essential to fair competition between incumbent cable operators and new entrants to the market. In its *Fifth Annual Competition Report*, the Commission stated:

MVPDs that provide competitive pressure on incumbent cable operators and provide consumers with real choice still find regulatory and other barriers to entry into markets for the delivery of video programming. MVPDs with the potential to compete with incumbent cable operators continue to experience some difficulties in obtaining programming, both from vertically integrated satellite cable programmers and from unaffiliated program vendors who continue to make exclusive agreements with cable operators.

In particular, the Commission recognized the importance of regional sports programming to competitive offerings:

Sports programming in the market for the delivery of video programming increasingly warrants special attention because of its widespread appeal and strategic significance for MVPDs.¹

Further, the FCC observed that "[l]ocal sports also holds value for operators because local sporting events often generate higher ratings than other cable and broadcast programming."²

The Joint Commenters are concerned that the Commission not adopt an overly narrow interpretation of its authority to prevent anticompetitive exclusive program access arrangements. As a number of competitive providers have indicated, the ability of incumbent operators to engage in anticompetitive practices is not limited to situations where the content providers and cable operators are vertically integrated. The program access rules contained in Section 628 of the Cable Act establish the minimum activities that are prohibited, and provide the Commission with

¹ *Fifth Annual Competition Report*, ¶ 171.

² *Fifth Annual Competition Report*, ¶ 175.

sufficient flexibility to prohibit additional types of conduct. In implementing Section 628(b) the Commission specifically indicated that its authority extended beyond vertically integrated programmers and cable operators stating:

This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of 628(b) applies on its face to all cable operators.³

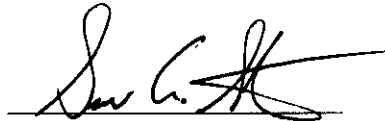
As noted by Hiawatha, exclusive agreements between unaffiliated program vendors and incumbent cable operators remain a significant barrier to fair competition, especially when an incumbent operator who controls a large percentage of the regional or national market obtains exclusive agreements and uses them against a competitor in a single market. This is precisely the type of anticompetitive conduct that both Mainstreet Communications and Unitel Communications have experienced firsthand in their efforts to introduce competition into their respective markets. Moreover, the Commission should recognize that even if Bresnan's anticompetitive conduct does not completely succeed in thwarting competition in Sauk Centre and Park Rapids, it will almost certainly impede the ability and speed of Mainstreet and Unitel to expand their service offerings into surrounding communities. These smaller new competitive entrants lack their opposition's virtually unlimited access to capital, and therefore only have a limited window of opportunity to commence service and build a sufficient customer base to compete. Absent the ability to offer the full range of programs and service options that their incumbent competitors are able to provide new entrant are

³ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd. 3359 (April 1, 1993)(FCC 93-178).

unlikely to be able to enter new markets. The end result being, that the congressional goal of promoting the rapid deployment of advanced telecommunications capabilities will be frustrated.

Despite the tremendous advantage that the existing cable monopolists enjoy in terms of financing, economies of scale and political clout, the Joint Commenters, and other similarly situated small new entrants, are fully prepared to compete against the entrenched incumbent cable operators and only seek the Commission's assistance to ensure that the competition is fair. If the FCC is to fulfil its statutory mandate to encourage such competition, it must play a more active regulatory role in eliminating the anticompetitive program practices of incumbent cable operators. If the FCC concludes that it lacks the authority under the program access rules as currently written to prohibit exclusivity agreements between non-vertically integrated programmers and MVPDs, the Commission is urged to seek legislation to redress this anticompetitive shortcoming in the Act.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Adrian Herbst', with a long horizontal stroke extending to the right.

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